A

SHAH REHAN ABDUL RAHMAN v. PP

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
AZIAH ALI JCA
ROHANA YUSUF JCA

B

[CRIMINAL APPEAL NO: J-05-202-08-2013]
5 FEBRUARY 2015

C

CRIMINAL PROCEDURE: *Defence – Witnesses – Trafficking in 1,952 grams cannabis – Failure of defence to call witnesses – Whether adverse inference ought to be invoked – Alcontara notice – Whether duly given – Whether accused placed with burden to prove his innocence – Whether trial judge considered defence sufficiently – Whether there was misdirection by trial judge – Evidence Act 1950, s. 114(g)*

D

EVIDENCE: *Witness – Failure to call witness – Adverse inference – Whether accused placed with burden to call witnesses – Whether adverse inference ought to be invoked – Alcontara notice – Whether duly given – Whether trial judge considered defence sufficiently – Whether there was misdirection by trial judge – Evidence Act 1950, s. 114(g)*

E

EVIDENCE: *Burden of proof – Accused's burden – Whether to cast a reasonable doubt on prosecution's case – Failure of defence to call witnesses – Whether adverse inference ought to be invoked under s. 114(g) Evidence Act 1950 – Alcontara notice – Whether duly given – Whether accused placed with burden to prove his innocence*

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The appellant committed an offence under the Dangerous Drugs Act 1952 for trafficking in 1,952 grams of cannabis. The prosecution's case was that the appellant was arrested when he was found holding a plastic bag containing dangerous drugs inside two envelopes. At the same time, the police team raided a house located about 30-50 metres from the place where the appellant was arrested in which three other males, including one Abdul

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Maungni, was arrested. SP1 was the leader of the arresting party and SP6 was the investigating officer. The defence submitted that the appellant followed his friend, one Baby Majidee, to Johor Bahru upon the latter's request. On the way, Baby Majidee stopped his car and asked the appellant to collect some money from Abdul Maungni's house. When the appellant went there,

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he saw one Shasha, whom he knew about six months before the arrest. Shasha gave the appellant one plastic bag containing two envelopes and mentioned that there was money in those envelopes. Whilst walking towards Baby Majidee's car, three police officers confronted the appellant and subsequently, he was arrested. However, Baby Majidee was no where to be seen and according to SP6, Shasha was later arrested. The appellant, in his

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defence, contended that he was merely an innocent carrier and denied any

knowledge about the drugs found in the bag. The High Court Judge found, *inter alia*, that (i) the appellant had actual possession of the drugs; (ii) the defence was a bare denial; and (iii) since the appellant failed to call Baby Majidee, Shasha and Abdul Maungni ('the three named persons') as witnesses, an adverse inference under s. 114(g) of the Evidence Act 1950 ('EA') ought to be invoked. Dissatisfied, the appellant appealed to this court.

Held (allowing appeal; setting aside conviction and sentence)
Per Balia Yusof Wahi JCA delivering the judgment of the court:

(1) The existence of the three named persons was not only revealed during the defence case but was brought up as early as when SP1 was called to give evidence. The *Alcontara* notice was duly given to the prosecution at the earliest stage of the case. Further, the appellant's version of the roles of Baby Majidee and Shasha was also put to this witness at this stage. (para 14)

(2) Judges must not delve in the believable and convincing test while applying the reasonable doubt test. An accused person needs to only raise a reasonable doubt. On the facts, the learned judge found the appellant's story to be unbelievable and unconvincing. While it was not wrong for His Lordship to conclude as such, it was still incumbent on his part to consider whether the defence nevertheless had raised a reasonable doubt. (para 19)

(3) No burden is placed on the accused to prove his innocence. To earn an acquittal, the accused merely has a duty to cast a reasonable doubt on the prosecution's case. Had the learned trial judge properly and sufficiently considered the explanation of the appellant in his defence and considered it together with the rest of all the evidence available, the probability of the defence story could not just be brushed aside. (paras 20 & 23)

(4) The learned trial judge had committed a serious error of law. Being under the erroneous belief that the appellant was duty bound to prove his case, the learned trial judge had totally dismissed the appellant's explanation. In a criminal trial, there is no burden cast on the accused to call witnesses and no adverse inference may be drawn on the failure of the defence to call witnesses. The trial judge erred by invoking s. 114(g) of the EA on the failure of the appellant to call the three named persons. As such, there was a clear misdirection by the learned trial judge. (paras 24 & 25)

Bahasa Malaysia *Translation Of Headnotes*

Tertuduh ('perayu') telah melakukan satu kesalahan di bawah Akta Dadah Berbahaya 1952 kerana mengedar 1,952 gram kanabis. Kes pihak pendakwaan adalah bahawa perayu telah ditangkap apabila dia didapati

memegang satu beg plastik yang mengandungi dadah berbahaya di dalam dua sampul surat. Pada masa yang sama, pasukan polis telah menyerbu sebuah rumah yang terletak 30-50 meter dari tempat perayu ditahan di mana tiga orang lelaki, termasuk seorang bernama Abdul Maungni, telah ditangkap. SP1 merupakan ketua pasukan tangkapan manakala SP6 adalah pegawai penyiasat. Pihak pembelaan pula berhujah bahawa atas permintaan kawan perayu, iaitu, seorang bernama Baby Majidee, perayu telah mengikutnya ke Johor Bahru. Semasa dalam perjalanan, Baby Majidee telah memberhentikan keretanya di hadapan sebuah kedai dan meminta perayu untuk mendapatkan wang dari rumah Abdul Maungni. Apabila sampai di sana, perayu telah melihat satu Shasha, yang dikenalinya selama enam bulan sebelum ditangkap. Shasha telah memberi satu beg plastik kepada perayu yang mengandungi dua sampul surat dan memaklumkannya bahawa terdapat wang di dalam sampul surat tersebut. Apabila menuju kereta Baby Majidee, pihak polis telah berhadapan dengan perayu dan selepas itu, dia ditangkap. Walau bagaimanapun, Baby Majidee tidak kelihatan di mana-mana dan menurut SP6, Shasha kemudiannya telah ditangkap. Pembelaan perayu adalah bahawa dia merupakan seorang pengangkut tidak bersalah di mana dia menafikan sebarang pengetahuan mengenai dadah yang dijumpai di dalam beg yang dianggap mengandungi wang. Hakim Mahkamah Tinggi mendapati, antara lain, bahawa (i) perayu mempunyai milikan sebenar dadah tersebut; (ii) pembelaan adalah penafian semata-mata; dan (iii) memandangkan perayu gagal untuk memanggil Baby Majidee, Shasha and Abdul Maungni ('ketiga-tiga penama') sebagai saksi, satu anggapan bertentangan harus dibangkitkan di bawah s. 114(g) Akta Keterangan 1950 ('AK'). Tidak puas hati, perayu merayu ke mahkamah ini.

Diputuskan (membenarkan rayuan; mengenepikan sabitan dan hukuman) Oleh Balia Yusof Wahi HMR menyampaikan penghakiman mahkamah:

(1) Kewujudan ketiga-tiga penama tersebut tidak dikemukakan hanya semasa kes pembelaan malah dibangkitkan seawal-awal apabila SP1 dipanggil untuk memberi keterangan. Notis *Alcontara* telah pun diberi kepada pihak pendakwaan pada peringkat awal kes. Tambahan, versi perayu berkenaan peranan Baby Majidee dan Shasha juga telah diajukan kepada saksi ini pada peringkat tersebut.

(2) Hakim-hakim tidak boleh mentelaah dalam ujian kepercayaan dan keyakinan apabila memakai ujian keraguan munasabah. Seseorang tertuduh hanya perlu membangkitkan keraguan munasabah. Berdasarkan fakta, Yang Arif hakim mendapati versi perayu tidak boleh dipercayai dan tidak meyakinkan. Walaupun tidak salah untuk Yang Arif memutuskan sedemikian, adalah penting untuk beliau mempertimbangkan sama ada pembelaan telah membangkitkan satu keraguan munasabah.

(3) Tiada beban diletakkan atas tertuduh untuk membuktikan ketidakbersalahannya. Untuk dibebaskan, perayu hanya perlu membangkitkan keraguan munasabah terhadap kes pihak pendakwaan. Berdasarkan fakta, jika Yang Arif hakim bicara telah, dengan seeloknya mempertimbangkan penjelasan perayu dalam pembelaannya dan mempertimbangkannya bersama-sama dengan keterangan lain, kebarangkalian versi pembelaan tidak boleh diketepikan.

(4) Yang Arif hakim bicara telah membuat satu kesilapan undang-undang yang serius. Memandangkan beliau mempunyai kepercayaan salah bahawa perayu mempunyai tugas untuk membuktikan kesnya, Yang Arif hakim bicara telah menolak penjelasan perayu secara keseluruhannya. Di dalam perbicaraan jenayah, tertuduh tidak mempunyai beban untuk memanggil saksi-saksi dan anggapan bertentangan tidak boleh dibuat atas kegagalan pembelaan untuk memanggil saksi. Hakim bicara khilaf dalam membangkitkan s. 114(g) AK terhadap kegagalan perayu untuk memanggil ketiga-tiga penama tersebut. Oleh itu, terdapat salah arah oleh Yang Arif hakim bicara.

Case(s) referred to:
Abu Bakar v. Regina [1963] 1 MLJ 288 ***(refd)***
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Choo Chang Teik & Anor v. PP [1991] 3 CLJ 2387; [1991] 1 CLJ (Rep) 54 SC ***(dist)***
D A Duncan v. PP [1980] 1 LNS 12 FC ***(refd)***
Goh Ah Yew v. PP [1948] 1 LNS 13 HC ***(refd)***
Illian & Anor v. PP [1988] 1 LNS 139 SC ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
PP v. Datuk Haji Harun Haji Idris & Ors [1977] 1 LNS 92 HC ***(refd)***
PP v. Tan Gong Wai & Anor [1984] 1 LNS 137 HC ***(refd)***
Rosenizam Maharam v. PP [2002] 1 LNS 260 HC ***(refd)***
Tan Foo Su v. PP [1967] 1 LNS 179 HC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 39B
Evidence Act 1950, s. 114(g)

For the appellant - Md Zahar Ngah; M/s Zahar & Partners
For the respondent - Nurshafini Mustapha; DPP

[Appeal from High Court, Johor Bahru; Criminal Trial No: 45A-18-2012]

Reported by Kumitha Abd Majid

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JUDGMENT

Balia Yusof Wahi JCA:

[1] The appellant was charged for an offence of trafficking in 1,952g of cannabis, a dangerous drug under the Dangerous Drugs Act 1952 ('DDA'). He was found guilty, convicted and sentenced to death by the High Court at Johor Bahru. This is his appeal against the said conviction and sentence.

The Prosecution Case

[2] Acting on information received, a team of police officers from the narcotics department of IPK Johor carried out an observation at the roadside in Kampung Melayu Pandan, Johor Bahru, Johor. The appellant was seen walking out from a road junction holding a white plastic bag in his right hand. He was arrested, and upon a search conducted, the white plastic bag was seized. Upon inspecting the bag, the police found two envelopes each containing a slab wrapped with transparent plastic, suspected to be drugs.

[3] As part of the prosecution's case, SP1, the leader of the team, stated that the appellant tried to run away upon being confronted by the police team and he had to be brought to the ground to effect the arrest. At the same time, some other police personnel raided a house located about 30-50 metres from the place where the appellant was arrested and three other males were arrested. One of them was Abdul Maungni. SP1 however, was not sure that the appellant was arrested as he was coming out of the said house.

The Defence Case

[4] On 22 March 2012 at about 5.45pm, the appellant received a phone call from his friend named Baby Majidee who asked the appellant to accompany him to Johor Bahru for the purpose of buying a car. Baby Majidee came to fetch him and he sat on the front passenger seat of Baby Majidee's car. Along the way, Baby Majidee stopped his car in front of a shop and asked the appellant to go to Abdul Maungni's house to take some money.

[5] The appellant went to Abdul Maungni's house and there, he saw Shasha whom he knew about six month before the arrest. Shasha gave the appellant one plastic bag containing two envelopes and said to the appellant that those envelopes contain the money. Thereafter, the appellant walked back towards Baby Majidee's car. Suddenly he was confronted by three men and was pushed to the ground. Later, he realised they were policemen and he became scared upon being told that the plastic bag contains drugs. At that time, Baby Majidee was nowhere to be seen.

[6] The appellant denies any knowledge about the drugs found in the plastic bag which he thought was money as told by Baby Majidee and Shasha earlier. In essence, the appellant's defence is that of an innocent carrier.

The Appeal

[7] In the appeal before us, learned counsel advanced two grounds namely:

(i) no actual possession; and

(ii) the failure of the learned judge to consider the defence sufficiently.

[8] On the issue of possession, the argument of learned counsel is quite simplistic, in that, without knowledge, there can be no possession. The appellant is an innocent carrier. He does not know what was in his possession. To him, it was money as told to him by Baby Majidee earlier and subsequently told by Shasha that the plastic bag contains money for Baby Majidee.

[9] In his findings on possession, the learned judge had found that the appellant had actual possession. At p. 16 of the appeal record, His Lordship stated:

> Berasaskan kedudukan tersebut, juga jelas menunjukkan yang OKT di dalam kes ini mempunyai pemilikan secara langsung (actual possession) terhadap dadah tersebut iaitu sebelum dan semasa dia di tahan.

[10] Earlier, the learned judge had considered the fact that the appellant put up a struggle and he had to be brought to the ground before the police could arrest him. Concluding his findings on the issue of possession, the element of knowledge was dealt with in the following words at p. 17 of the Appeal Record ... :

> Dari aspek pengetahuan pula, untuk menghubungkan OKT sebagai mempunyai pengetahuan terhadap dadah Cannabis yang dijumpai itu, apa yang dihujahkan oleh pihak Pendakwaan, ada meritnya bila mana dihujahkan bahawa OKT mempunyai pengetahuan tentang kewujudan dadah Cannabis tersebut. (Reaksi OKT yang dikatakan melawan dan berlaku pergelutan ketika dadah tersebut ditemui oleh SP1 Pegawai Serbuan, jelas menunjukkan bahawa OKT mengetahui akan terdapatnya dadah di dalam ekshibit P7A itu. Reaksi OKT tersebut adalah konsisten dengan kewujudan dadah yang dijumpai di dalam P7A.

[11] We agree with the findings made by the learned judge. The appellant had possession of the impugned drugs.

[12] Upon his consideration of the defence, the learned judge had found that the appellant's defence "sukar untuk diterima", "tiada mempunyai asas yang kukuh" and "tiada pembuktian yang konkrit ditampilkan" (see p. 25 of the appeal record).

[13] The learned judge found that it was just impossible to believe that the appellant only knew the content of the envelope in the plastic bag to be drugs upon being told by the police after his arrest. In His Lordship's view, that

defence is a bare denial and bare denial can never be a good defence. (*D A Duncan v. PP* [1980] 1 LNS 12, *Rosenizam Maharam v. PP* [2002] 1 LNS 260; [2003] 5 MLJ 49).

[14] It would be recalled that three other persons were named by the appellant in his defence, namely: Baby Majidee, Shasha and Abdul Maungni. The existence of these three persons was also not only revealed during the defence case but was brought up as early as when SP1 was called to give evidence. It is not true as submitted by the learned Deputy that these three names only surfaced when SP6, the investigating officer, gave evidence. The *Alcontara* notice [1996] 1 CLJ 705 was duly given to the prosecution at the earliest stage of the case. The appellant's version of the roles of Baby Majidee and Shasha was also put to this witness at this stage.

[15] While under cross-examination, SP1 confirmed that the appellant was arrested about 30-50 metres away from the house where three others were also arrested in relation to drug offences. One of them was Abdul Maungni who was arrested in respect of "kes ganja".

[16] During re-examination by the learned Deputy Public Prosecutor, SP1 also testified that Abdul Maungni's house was also targeted arising from the two different information he received.

[17] SP6, the investigating officer, confirmed that Shasha was also later arrested and charged under s. 39B of the DDA involving the drug cannabis.

[18] In addressing his mind to the defence, the learned judge said at p. 29 of the appeal record:

> Semasa di dalam pembelaannya, OKT telah menyebutkan nama-nama Abdul Maungni, Shasha dan Baby Majidee dengan peranan-peranan tertentu dikatakan dimainkan oleh penama-penama tersebut. Namun, nama dan peranan mereka ini hanya disebut begitu sahaja. Mereka tidak ditampilkan sebagai saksi pembelaan.
>
> ...
>
> Jelaslah, jika mereka ini dikatakan dapat memberikan keterangan demi mengukuhkan lagi Pembelaan OKT, maka keperluan untuk mengemukakan mereka ke Mahkamah ini adalah sangat vital. (*Baharom v. Public Prosecutor* [1960] 1 MLJ 249). Lantas kegagalan untuk mengemukakan ketiga-tiga penama ini menyebabkan anggapan di bawah Seksyen 114(g) Akta Keterangan, 1950 terpakai.

[19] There are two aspects of the learned judge's consideration of the defence that merits our comment. Firstly, judges must again be reminded not to delve in the "believable and convincing" test in applying the "reasonable doubt" test. It is trite that an accused person need only raise a reasonable doubt. This was the reminder given by the Supreme Court in *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311. The learned judge in the instant appeal found the appellant's defence story to be unbelievable

and unconvincing. While it is not wrong for His Lordship to conclude that the defence story is unbelievable/false and unconvincing, it is still incumbent on his part to consider whether the defence nevertheless has raised a reasonable doubt.

[20] Secondly, it is a well-established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt in the prosecution's case (per Mohamed Azmi SCJ in *Mohamad Radhi Yaakob v. PP* (*supra*) at p. 385).

[21] While it is perfectly proper that a judge may view with suspicion or disbelieve the defence story, he is still bound to consider the defence however weak, and to acquit only if he is not satisfied that the prosecution had discharged the burden of proof which rests upon it.

[22] It is trite law that the explanation given by an accused has to be considered together with the rest of the evidence in the case and that he will be entitled to an acquittal if as a result of such explanation the existence of a material fact on which the prosecution relied is no longer so probable as to make a prudent man act upon the supposition that the fact exists (per Augustine Paul J (as he then was) in *PP v. Chia Leong Foo* [2000] 4 CLJ 649 p. 683).

[23] We are of the considered view that had the learned trial judge properly and sufficiently considered the explanation of the appellant in his defence and consider it together with the rest of all the evidence available, the probability of the defence story could not just be brushed aside.

[24] The three named persons are not fictitious characters. Three others were arrested at a house nearby at about the same time when the appellant was arrested. One of them was Abdul Maungni and he was arrested in respect of 'kes ganja'. Later, Shasha was also arrested and charged under s. 39B of the DDA. And SP1, the leader of the arresting party, confirmed that he received two different information which led to the arrest of the appellant and Abdul Maungni's home being targeted as part of his mission on that day. Being too pre occupied and under the erroneous belief that the appellant is duty bound to prove his case, the learned trial judge had failed to appreciate and had totally dismissed the appellant's explanation. The learned judge had committed a serious error of law.

[25] Generally, in a criminal trial, there is no burden cast on the accused to call witnesses and no adverse inference may be drawn on the failure of the defence to call witnesses. (*Goh Ah Yew v. PP* [1948] 1 LNS 13; [1949] MLJ

150, *Abu Bakar v. Regina* [1963] 1 MLJ 288, *PP v. Tan Gong Wai & Anor* [1984] 1 LNS 137; [1935] 1 MLJ 355, *Illian & Anor v. PP* [1988] 1 LNS 139; [1988] 1 MLJ 421, *Tan Foo Su v. PP* [1967] 1 LNS 179; [1967] 2 MLJ 19). The learned trial judge in the instant appeal had erred in invoking the s. 114(g) of the Evidence Act 1950 provision on the failure of the appellant to call the three named persons. On that ground alone, we ought to allow the appeal. There was a clear misdirection by the learned trial judge.

[26] Eusoffe Abdoolcader J (as he then was) in *PP v. Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 LNS 92; [1977] 1 MLJ 180 among others had commented:

> … No unfavourable inference can or will be drawn against the accused for not calling these or any other witnesses and I make no adverse inference or assumption whatsoever against them in this respect. I do not think however that I am necessarily precluded from commenting on or taking into consideration the failure to call particular witness or witnesses in weighing the credibility of the evidence adduced by and for the defence and in viewing the whole of the material upon which I have to decide in order to determine whether the explanation of the accused has cast a reasonable doubt on the case for the prosecution. I must repeat however and make it abundantly clear that in a criminal case there is no obligation on the defence to call any witness and it is entirely open to the defence to adduce no evidence at all, and all that they need to do is to raise a reasonable doubt when called upon to enter on their defence, though the failure to call any particular witness may be a matter the court can take into account (without however drawing any adverse inference or making any assumption or presumption whatsoever against the defence in that regard), particularly as in this case the potential witnesses were persons in respect of whom the prosecution had probably no cogent means of knowing that they might have any relevant evidence to give until the accused themselves and their witnesses came to give evidence (*Regina v. Gallagher* [1974] 1 WLR 1204; *Public Prosecutor v. Lim Kuan Hock* [1967] 2 MLJ 114, 115; *Tay Choo Wah v. Public Prosecutor* [1976] 2 MLJ 95, 100.

[27] The learned Deputy Public Prosecutor in her submissions in reply had referred to the case of *Choo Chang Teik & Anor v. PP* [1991] 3 CLJ 2387; [1991] 1 CLJ (Rep) 54; [1991] 3 MLJ 423 in support of her contention that adverse inference may be drawn against the appellant for his failure to call witnesses in support of his defence.

[28] We agree that the said general principle is not without exception and the said case of *Choo Chang Teik & Anor v. PP* (*supra*) referred to by the learned Deputy is a clear illustration. We shall now revert to that case. In his defence, the first appellant in the said case stated that he had been beaten by thugs at his friend's house which left him disabled for two years. They have injured his waist. He also produced a certificate of his membership of a handicapped persons' association to prove his contention. The first appellant had failed to call his witness to testify that he had been attacked by thugs two

years before as a reason for him running away from the scene when the police party raided the house. The learned judge had drawn an adverse inference against him under s. 114 (g) of the Evidence Act 1950 and this was affirmed by the Supreme Court. The prosecution had taken particular issue on the contention of the first appellant that he had been beaten by thugs two years ago. Evidence in rebuttal was introduced by the prosecution showing that the first appellant had told some police officers that he had a fall in his cell which caused his injury.

[29] The distinction which can be drawn in that case is that upon rebuttal evidence being adduced by the prosecution, the onus shift to the first appellant to prove his contention by calling his friend at whose house he was beaten. On his failure to do so, the natural conclusion and inference is that, the proof, if produced, instead of rebutting would sustain the charge, thus attracting the adverse presumption. On that distinction, we found the authority referred to by the learned Deputy to be inapplicable to the facts and circumstances of the instant appeal.

[30] For the aforesaid reason, we allowed the appeal and set aside the conviction and sentence. The appellant is acquitted and discharged.